

Randall C. Budge, ISB No. 1949
Scott J. Smith, ISB No. 6014
Candice M. McHugh, ISB No. 5908
Thomas J. Budge, ISB No. 7465
RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED
101 S. Capitol Blvd., Suite 208
Boise, ID 83702
Telephone: (208) 395-0011
Facsimile: (208) 433-0167

RECEIVED
JUN 12 2008
DEPARTMENT OF
WATER RESOURCES

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS

In Re: SRBA	)	
	)	Subcase No.: 00-92026
	)	
	)	GROUND WATER DISTRICT'S
	)	RESPONSE TO IDAHO POWER AND
Case No. 39576	)	BUREAU OF RECLAMATION'S STATEMENT
	)	OF ISSUE
	)	
	)	

COME NOW THE ABERDEEN AMERICAN FALLS GROUND WATER DISTRICT, BINGHAM GROUND WATER DISTRICT, BONNEVILLE-JEFFERSON GROUND WATER DISTRICT, MADISON GROUND WATER DISTRICT, MAGIC VALLEY GROUND WATER DISTRICT, NORTH SNAKE GROUND WATER DISTRICT, and JEFFERSON-CLARK GROUND WATER DISTRICT (the "Ground Water Districts") on behalf of their respective members through counsel and hereby file this Response to *Idaho Power Company's Statement of Common Issues for Resolution in Consolidated Proceedings and Proposed Scheduling Order* and the *United States' Statement of Issues and Proposed Scheduling Order* (collectively "Statements") and pursuant to the *Notice of Status and Scheduling Conference and Setting Deadline to File Statements of Common Issues and Responses* dated May 22, 2008 ("Notice").

BACKGROUND

On October 22, 2007, the Court issued its *Order Separating and Consolidating Common Issues from Subcases in Exhibit A on Remark Regarding Subordination of Hydropower Rights Based on "Historical Practices"* and issued an *Order Designating Matter as Consolidated Subcase No. 92-26*. On January 25, 2008 the Court set a deadline for the Idaho Department of Water Resources ("IDWR" or "Department") to issue 706 Reports for eight subcases where IDWR had recommended subordination of the water rights. IDWR filed its 706 reports on April 11, 2008, for subcase nos. 1-217, 1-218, 1-2064, 1-2068, 1-4024, 1-4025 and 1-4054 and on May 19, 2008, for subcase no. 63-367.

DISCUSSION

The Department's 706 Reports in these subcases make it clear that there are specific historical documents, delivery practices and circumstances, unique to each subcase that support the inclusion of the historical practices remark. Attached to the Department's 706 Reports are numerous historical documents that provide the factual basis to justify the Department's legal authority under Idaho Code § 42-1411(2) that requires the Director to include such remarks or conditions that are "necessary for definition of the right, for clarification of any element of a right, or for administration of the right by the director." Historical practices and administration of water rights can be that basis, without question. This question has already been answered in the affirmative by the Idaho Supreme Court regarding general provisions and the same logic applies in these cases. In *State v. Idaho Conservation League*, 131 Idaho 329, 9455 P.2d 1108 (1998), the Idaho Supreme Court held that a general provision based on historical administrative practices could be necessary for the efficient administration of a water right "because it avoids controversy

among the water rights holders by clearly notifying them of the mechanism [of administration].” *Id.* at 334-35, 955 P.2d at 1113-14.

Idaho Power and the United States both frame the issue to be decided by the Court in these subcases in very broad terms. The United States proposes the following issue:

Whether the priority of a water right can be subordinated to either existing or future water rights on the basis that the right holder has not placed a delivery call against junior water right holders over a certain period of time?

Idaho Power proposes:

Other than legal abandonment or forfeiture, can historic practice regarding use or administration of a water right, including the absence of a call in the past, deny a party’s right to enforce a senior priority?

Although posed somewhat differently, both proposals implicate whether or not historic practices and administration between and among water rights is a valid basis for the Director’s authority to include a remark or condition on the water right. The answer to this question is yes. Yet, the proposal by the United States and Idaho Power goes farther, and wants to determine with a broad brush that in these subcases, subordination is not justified and they propose to answer that question without regard to the specific facts in the subcases. As is discussed in the Department’s 706 Reports filed in the underlying subcases, the factual circumstances surrounding the underlying subcases provide the context in which to determine whether historic practice and administration support the conditions placed on the water rights under both legal and equitable theories. To determine whether the subordination remark is appropriate requires a factual inquiry into each water right, its historical use and administration and its relationship to other water rights in the basin or stream system. This is more appropriately done before the Special Master who will be determining all the elements of these water rights and can best be evaluated on an individual subcase by subcase basis.

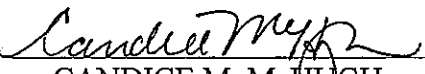
Furthermore, the issues as framed by the United States and Idaho Power have broad implications on foreclosing specific legal and equitable defenses junior water users may assert in a water delivery call. Such defenses and questions must be not be answered in a vacuum without regard to the specific factual relationship between water rights.

CONCLUSION

Consolidation of subcases is allowed if it provides for a more efficient and effective manner to determine common issues of law and fact. However, these subcases do not provide that common question of law or fact. The legal and equitable basis for the inclusion of the subordination remark turns on the factual basis. Administrative Order 1 at 19 ¶ 11. The factual basis in these subcases varies from subcase to subcase and is better suited for determination before the Special Master. Therefore, the Ground Water Districts propose that the cases be deconsolidated and that all issues be sent to the Special Master to be determined along with all other elements of the water rights that are in dispute.

DATED this 10th day of June, 2008.

RACINE OLSON NYE BUDGE & BAILEY

By: 
CANDICE M. McNUGH
Attorneys for Plaintiffs

CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing was served on June 10th, 2008, electronic mail to those with email addresses or by U.S. mail to the following:

SRBA District Court (fax filed)
253 3rd Avenue North
P.O. Box 2707
Twin Falls, ID 83303-2707
Facsimile: (208) 736-2121

MINIDOKA IRRIGATION DISTRICT

Represented by:
W. Kent Fletcher
1200 Overland Avenue
P.O. Box 248
Burley, ID 83318
Email: wkf@pmt.org

KING HILL IRRIGATION DISTRICT

Represented by:
Daniel V. Steenson
455 S. Third Street
P.O. Box 2773
Boise, ID 83701-2773
Email: dvs@ringertclark.com

DIRECTOR OF IDWR

P.O. Box 83720
Boise, ID 83720-0098

IDAHO POWER COMPANY

Represented by:
James C. Tucker
Idaho Power Co.
P.O. Box 70
Boise, ID 83707
Email: jamestucker@idahopower.com

A & B IRRIGATION DISTRICT
BURLEY IRRIGATION DISTRICT
FALLS IRRIGATION DISTRICT

Represented by:
Roger D. Ling
615 H. Street
P.O. Box 396
Rupert, ID 83350-0396
Email: rdl@idlawfirm.com

IDAHO POWER COMPANY

Represented by:
John K. Simpson
1010 W. Jefferson, Ste. 102
P.O. Box 2139
Boise, ID 83701-2139
Email: jks@idahowaters.com

MILNER IRRIGATION DIST.
NORTH SIDE CANAL COMPANY
TWIN FALLS CANAL COMPANY

Represented by:
Travis L. Thompson
113 Main Ave. W., Ste. 303
P.O. Box 485
Twin Falls, ID 83303-0485
Email: tlt@idahowaters.com

CITY OF POCA TELLO

Represented by:
Josephine P. Beeman
409 W. Jefferson St.
Boise, ID 83702
Email: jo.beeman@beemanlaw.com

IDAHO POWER COMPANY

Represented by:
Michael A. Gheleta
BROWNSTEIN HYATT ET AL
410 17th Street, Suite 2200
Denver, CO 80202
Email: mgheleta@BHFS.com

USDI BUREAU OF RECLAMATION

Represented by:
US Department of Justice
Environment & Nat'l Resources
550 W. Fort Street, MSC 033
Boise, ID 83724
Email: david.gehlert@usdoj.gov

STATE OF IDAHO

Represented by:
Natural Resources Div. Chief
Attorney General's Office
P.O. Box 44449
Boise, ID 83711-4449
Email: david.stanish@ag.idaho.gov

Aldrich Bowler
HC 60 Box 1110
Bliss, ID 83314

ALDRICH BOWLER LIVING TRUST

c/o Peter A. Bowler
555 River Road #3
Bliss, ID 83314


CANDICE M. McHUGH